

**United States District Court
Southern District of Ohio
Western Division**

Estate of Roger D. Owensby, Jr.,
Plaintiff

No. C-1-01-769

vs.

Spiegel, J.; Novotny, MJ

City of Cincinnati,
Defendant

ORDER

Now before the Court is a motion to quash a subpoena issued by plaintiff to Michael K. Allen in his official capacity as Hamilton County Prosecutor (Doc. 56). Prosecuting Attorney Allen maintains that he is prohibited by state law from releasing the subpoenaed records and that this federal court's enforcement of the subpoena would interfere with a pending state court action. The subpoenaed records include trial exhibits, pleadings and witness statements, including transcripts of grand jury witness testimony, from the state criminal prosecutions of former Cincinnati police officers Robert Jorg and Patrick Caton, who are defendants in this federal civil action. Following the acquittal of Robert Jorg in state court, a state judge sealed the records of that proceeding pursuant to Ohio Rev. Code §2953.52. Plaintiff opposes the motion to quash (Doc. 58), and movant Allen has filed a reply (Doc. 60).

Background

Magistrate Judge Jack Sherman, Jr. previously ruled on a similar discovery motion filed in this action. In the previous motion to compel production of documents, at issue were generally the same records subpoenaed here which were in the possession of defendant City of Cincinnati. The City of Cincinnati argued the requested court records could not be produced because they had been sealed by the state court judge. Judge Sherman ruled that the City must produce the sealed records, finding that "[T]he Supremacy Clause mandates that, in this litigation, Rule 26(b)(1) must triumph over Ohio Rev. Code §2953.52", and citing *Burlington N.R.R. Co. V. Woods*, 480 US 1, 4-5 (1987).

Subpoenaed Documents

For the reasons stated by Judge Sherman, the motion to quash the subpoena, as it relates to (1) trial exhibits and pleadings filed in *State v. Jorg*, Case No. B-0009502, Hamilton County Court of Common Pleas, (2) non-grand jury witness statements obtained and possessed by the Prosecuting Attorney in *State v. Jorg* and *State v. Caton*, Case No. 01-CRB-206, Hamilton County Municipal Court, and (3) all non-grand jury documents and things in the possession or control of the Prosecuting Attorney that relate to the death of plaintiff and/or the related investigation and/or prosecution of public employees, including Robert Jorg and Patrick Caton, is DENIED. These documents shall be produced by the Prosecuting Attorney within ten days of the date of this order.

With regard to the subpoenaed state grand jury records, plaintiff and movant shall attempt in good faith to resolve whether any grand jury transcripts of witness testimony exist which are not already in plaintiff's possession. If undisclosed transcripts do exist, plaintiff may move to compel their production and the issue will be further considered by the Court at that time. In this respect as to state grand jury transcripts, the motion to quash is GRANTED, subject to further consideration upon plaintiff's filing of a motion to compel.

s/Susan M. Novotny

Susan M. Novotny

United States Magistrate Judge